U.S. Department of Justice

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December 2, 2004

Hon. Katharine S. Hayden
United States District Judge
U.S. Post Office & Courthouse Building
P.O. Box 999
Newark, New Jersey 07101-0999

Re: United States v. Hemant Lakhani
Criminal No. 03-880

Dear Judge Hayden:

This letter contains a number of in limine motions in connection with the above-captioned trial, which is scheduled to start on January 4, 2005. The government respectfully requests that these matters be addressed prior to opening statements.

1. Miscellaneous Items Related to Cooperating Witness

The government will call MR as a witness at trial. MR cooperated in the investigation and participated in the numerous taped conversations and meetings that will be presented to the jury. MR served as an informant and received payment for his services; he is not a cooperating co-conspirator. MR will likely face lengthy cross-examination concerning these payments, various immigration-related benefits he and his family have received with the assistance of law enforcement, and other matters. These areas are not the subject of this in limine application. Beyond these items, the government is aware of a number of issues relating to MR which should not be inquired into on cross-examination or referred to in opening argument.

A. Failure to pay two months' rent. MR did not have

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, *if probative of truthfulness or untruthfulness*, be inquired into on cross-examination. . . .

(emphasis added). By its very terms, the rule does not permit questions about conduct that does not indicate a lack of truthfulness. This "principle is clear in most instances: acts such as perjury reflect on the witness' truthfulness, acts such as communication of threats or the witness' failure to pay debts do not." Davidson Pipe Co. v. Laventhol and Horwath, 120 F.R.D. 55, 62 (S.D.N.Y. 1988). MR's failure to pay his rent for two months falls on the clear side of this divide and is not open to cross-examination under the caselaw. See, e.g., United States v. Lanza, 790 F.2d 1015, 1020 (2d Cir. 1986) (evidence of a witness' failure to pay his debts was not probative on the issue of truthfulness and had little, if any, relevance to his credibility); United States v. Robinson, 546 F.2d 309, 313 (9th Cir. 1976) (district court properly limited cross-examination about failure to make rental payments on a television set, which "seemed designed more to obfuscate the issues and confuse the jury" than to reveal dishonesty).

B. $900 check resulting in arrest & dismissal of charges. In or about 1999, MR wrote a check for $900 to a third party. At the time, MR explained that there were sufficient funds in his account to cover the check. Afterward, he withdrew money from the account, leaving an insufficient balance to cover the $900 check. After more than a year, he contacted the bank and made full restitution for the bounced check. At the time, MR was unaware of any charges. MR was later arrested in February 2001 on an outstanding felony warrant issued by the Olathe Police Department, Olathe, Kansas, for insufficient funds. The charges, in the form of a complaint, were ultimately dismissed.

Neither Rule 608(b) nor Rule 609 permit cross-examination on this issue. Rule 609 provides for impeachment by evidence of a *conviction*. Since the charges were properly

United States v. Byrne, 422 F. Supp. 147, 166 (E.D. Pa. 1976) and explained that "since the writing of checks which bounce can often occur where no criminal intent is involved," the matter was "not probative of the witness's truthfulness" under Rule 608(b). The trial court also noted that there had been neither an indictment nor a conviction. Id. (Although a complaint and arrest warrant had been issued in the instant matter, there was no indictment or conviction.) The Third Circuit affirmed, finding no abuse of discretion. United States v. Cahalane, 560 F.2d 601 606 (3d Cir. 1977) (affirming in part, vacating in part, and remanding). See also United States v. Estell, 539 F.2d 697, 700 (10th Cir. 1976) (cross-examination for passing worthless checks excluded).

This area of law is quite fact specific, and where there is a stronger indication of fraud, cross-examination may be appropriate. For example, writing a series of worthless checks on a closed account can invite inquiry under Rule 608(b). United States v. Lawton, 366 F.3d 550, 552 (7th Cir. 2004). Here, where MR wrote checks on an existing account, which had sufficient funds at the time, and made restitution before learning of any charges, the Court should exercise its discretion to exclude cross-examination.

C. Unrelated civil business disputes.

MR has been involved in various civil business disputes, some of which have resulted in civil litigation. In general, these incidents involved disputed facts, where parties have differing versions of what transpired in their business transactions. The matters are entirely extrinsic to the subject of MR's testimony. In one instance, for example, a customer of MR's alleged that he paid $10,000 for goat meat and received mutton. Bills of lading from a storage facility support MR's position that he sold the customer goat. In no event, should this extrinsic, scintillating tale become part of a federal criminal trial. In another matter, two sides differ as to certain product that was to have been provided. One dispute has been settled amicably. In another matter, MR acknowledges that he is indebted for certain business transactions and plans to repay the debt. None of these incidents, which were referred to in a local newspaper article on April 4, 2004, are proper grist

that do not actually indicate a lack of truthfulness." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 608.22[2][c] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 1997) (footnotes omitted). For this reason, cross-examination about unrelated civil actions that do not bear on credibility is beyond the scope of Rule 608(b). See Lanza, 790 F.2d at 1020 (court limited cross-examination about civil action involving the purchase of a taxi, noting questioning was not sufficiently relevant to credibility).

Questioning about unrelated, civil business disputes should be disallowed for other reasons as well: "[s]ide-excursions into the witness's past, usually unrelated to the substantive issues being tried, create a real danger of confusing the issues and prolonging the trial." Weinstein's Federal Evidence, § 608.02[2]. Such disputed sideshows run afoul of Fed. R. Evid. 403, since the probative value of pursuing the involved details of a civil dispute is outweighed by the danger of distracting and confusing the jury and wasting time. See id. at § 608.22[2][c][iv] (cases applying Rule 403 analysis to Rule 608(b) determination).

Accordingly, inquiry into these areas on cross-examination should not be allowed.

D. Accusations raised by Charles Lee

Charles Lee is a former DEA agent who supervised MR while he cooperated in Pakistan. After Lee retired from the DEA, he and MR became business partners in 2000. Lee has accused MR of various improprieties in the conduct of their business. Lee has given the defense a nine-page letter, describing his allegations. Lee alleged that MR sold a quantity of rice to two buyers. MR denies this and has a different account of what occurred. Lee reported hearsay information from a third party that MR supposedly stole $44,000 from the third party. MR denies this. Lee also wrote that the third party "presumed" MR stole four to six missing green cards. Elsewhere, Lee said the person "saw" MR steal the cards and switch pictures on passports. MR denies this as well. Lee also raised other hearsay allegations that MR denies.

1. Whether MR may be cross-examined about Lee's claim that he sold a quantity of rice to two people lies within the Court's discretion. At most, defense counsel may ask about the subject on cross-examination. The government anticipates that MR will deny the allegation. If allowed at all, that should be the end of the inquiry.

2. Lee has been subpoenaed to testify by the defense. In no event can he testify about his business dealings with MR. Such testimony would squarely violate Rule 608(b)'s bar against impeachment by extrinsic evidence. This prohibition is well-settled; it "goes back nearly 300 years to the courts of seventeenth century England." United States v. McNeill, 887 F.2d 448, 453 (3d Cir. 1989). As discussed in Judge Weinstein's treatise on evidence,

> [c]ourts often summarize the operation of the no-extrinsic-evidence rule by stating that "the examiner must take (or is bound by) the witness's answer." Thus, the cross-examiner may not call other witnesses to prove a specific incident of misconduct after the witness has denied on cross-examination that the incident occurred.

Weinstein's Federal Evidence, § 608.22(1) (citations omitted). See also United States v. Frost, 914 F.2d 756 (6th Cir. 1990) (separate witness barred from testifying about government witness's alleged misuse and theft of funds under Rule 608(b)); United States v. Agnes, 753 F.2d 293 (3d Cir. 1985) (expert witness barred from testifying about his own business dealings with government witness on grounds that it was extrinsic evidence under Rule 608(b)). In other words, neither Charles Lee nor any other witness may testify about specific business deals with the cooperating witness. Such extrinsic evidence is specifically precluded by Rule 608(b).

3. Lee's varying hearsay accounts of a third party's accusations are not reliable. The source of that information agreed to sell five tons of hashish and 600 kilograms of Pakistani heroin in exchange for cash and four shoulder-fired Stinger missiles, which were to be sold to the Taliban. He has pled guilty in federal court to conspiring to provide material support to terrorists and conspiring to distribute heroin and

misleading the jury and delaying the trial, contrary to Rule 403.

2. Narrowing of Count 1

Count 1 charges defendant with attempting to provide material support to terrorists. It details his efforts to sell shoulder-fired surface-to-air missiles to individuals defendant believed were terrorists, for use in attacks on American commercial aircraft. See Count 1, ¶¶ 2-15, 17-18. Paragraph 16 alleges that, as part of the scheme, defendant solicited officers of the Russian Federal Security Service posing as weapons suppliers to sell him a multi-ton quantity of C-4 explosives.

According to a transcript of the meeting with Russian officials, defendant was inquiring about kilogram quantities of liquid uranium. When Russian officials tried to confirm whether defendant was describing plastic explosives, defendant replied, "uranium."

Accordingly, the government now provides notice that it will not rely on paragraph 16 at trial. The government will prepare a redacted indictment removing this paragraph.

Narrowing the proofs at trial presents no notice problem. See United States v. Miller, 471 U.S. 130, 134-35 (1984). Defendant has been aware of the need to defend against the remaining allegations in Count 1, which the government will prove at trial. Therefore, he cannot claim prejudicial surprise by any narrowing. The indictment plainly sets out the offense the government intends to prove; if anything, it charged more than was necessary.

The Supreme Court addressed a similar situation in Miller and found no impermissible amendment when the government did not offer proof as to one of two theories of a charged mail fraud scheme. 471 U.S. at 134-38. The Court explicitly rejected the proposition that a narrowing of an indictment is unconstitutional, and reinstated a conviction. Id. at 144. As the Court explained,

> As long as the crime and the elements of the offense that sustain the conviction are fully and

aiding and abetting charge and not on armed bank robbery charge); United States v. Smith, 918 F.2d 1032, 1036 (2d Cir. 1990) ("narrowing the scope of an indictment, whether through proof of a lesser offense offered at trial, or by redaction, does not offend the notice and review functions served by a grand jury's issuance of an indictment"). United States v. Castro, 776 F.2d 1118, 1123 (3d Cir. 1985) (narrowing scope of evidence to prove an offense charged in indictment held valid).

Miller reaffirmed the true concern raised by amending an indictment: "broadening the possible bases for conviction from that which appeared in the indictment." 471 U.S. at 138; see also Stirone v. United States, 361 U.S. 212 (1960). No such danger is presented here, since the allegations the government will rely on at trial are all charged in Count 1.

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Thank you for your attention to this matter. The government respectfully requests that these matters be addressed before opening statements.

Respectfully submitted,

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